IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO.2655 OF 2005

Prabhakar Moreshwar Vaidya .. ..Petitioner

Versus

Laxmibai Shankar Powar & ors. .. ..Respondents

Mr.G.S.Godbole with Arfan Sait for petitioner

Mr.G.R.Rege with S.M.Railkar for respondent nos.2 & 3

CORAM : P.V.KAKADE, J.

DATE : 21ST MARCH, 2006.

P.C.:

1. Heard the learned counsel for both the parties.

2. This petition is preferred against the judgment and order passed by the Joint District Judge, Ratnagiri

dated 21st March 2005 dismissing the appeal of the petitioner and confirming the order passed by the Civil Judge (Senior Division), Ratnagiri dated 23.1.2002 rejecting the application for setting aside the ex-parte decree passed against him by the Court in the suit for eviction from the suit premises under the provisions of the Bombay Rent Act.

3. On passing of the decree against the petitioner, the petitioner preferred initially an application for review of the appellate court's order, however, subsequently the application was filed for setting aside the ex-parte decree before the trial court on the ground that the respondent-plaintiff had filed suit RCS Suit No.185 of 1992 against him which was fixed on 4.10.1993 before the Court for recording of evidence. On that day an order to transfer the suit to the Court of Civil Judge (Junior Division) was passed and no date was given by the concern clerk saying that the date would be given by the Court of Civil Judge, Junior Division. On 16.11.1993 suit was transferred to the Court of Civil Judge, Junior Division but no date was given. The defendant's counsel enquired from the concern clerk time to time but he was informed the suit had not received by

him from the Court of Civil Judge, Senior Division. The concern clerk disclosed that after he would trace out the suit he would inform the date. On 4.1.1993 the petitioner's counsel enquired from the concern clerk about the date, he informed that the suit proceeding was missing. In fact the said suit was fixed on 11.1.1994 for evidence, which date was not informed or known to the applicant or his counsel and hence on the same day after recording the evidence of the plaintiff an ex-parte decree was granted against the petitioner and hence the impugned application came to be filed. The said application was resisted on behalf of the respondents on the ground that the allegations made by the petitioner were not correct and it was due to negligence on petitioner's and Advocate's part, the decree came to be passed and therefore, even on merits the application was not tenable. The record shows that the present petitioner had not even filed his written statement inspite of the fact that matter was adjourned from time to time for filing of written statement.

5. On that background the learned trial judge adjudicated the application on merits rasing the point whether the applicant was entitled to get the decree

passed in RCC No.185 of 1992 set aside. The Trial Court came to the conclusion after hearing both the parties that application deserves to be dismissed as there was no sufficient cause shown by the petitioner to set aside the ex-parte decree. While adjudicating the application, it was also held that the application was to be treated under the provision of Order 8 Rule 10 of the Code of Civil Procedure and not under Order 9 Rule 13 of the Code of Civil Procedure. While considering the procedural maintainability of the application, it appears that the trial court has also taken into account the factual aspects involved in the dispute in the course of his discussion.

. The rejection of the application gave rise to Misc. Civil Appeal No.9 of 2002. The lower appellate court after hearing both the parties came to the conclusion that the application given by the petitioner was under Order 9 Rule 13 of the Code of Civil Procedure and it was maintainable under the said provision. However, on merits it was found that the application deserve to be dismissed and consequently appeal came to be dismissed. Hence, the present petition.

6. At the outset, it may be noted that the learned counsel for the petitioner agrees with the finding recorded by the lower court to the effect that indeed the application involved was under Order 9 Rule 13 of the Code of Civil Procedure. However, the learned counsel has taken strong exception to the later finding recorded by the lower appellate court regrading merits of the dispute with argument that the proper course for the lower appellate court was to remand the matter to the trial court for adjudication afresh of the application on merits because there was no adjudication of the application on merits and therefore, decision on merits by the lower appellate court has resulted in causing prejudice to the petitioner because he has lost right of one more appeal to the lower appellate court. This argument was made on the basis of the fact that the trial court had come to the conclusion that the application was to be treated under Order 8 Rule 10 of the Code of Civil Procedure and not under Order 9 Rule 13 of the Code of Civil Procedure, which finding was reversed by the lower appellate court holding that the application indeed was under Order 9 Rule 13 of the Code of Civil Procedure, therefore, according to the learned counsel for the petitioner that what the lower appellate

court should have done was to record the finding regarding maintainability of the application under Order 9 Rule 13 of the Code of Civil Procedure without referring to the merits of the dispute which according to him were not adjudicated properly by the trial court.

7. On perusal of the entire record I would prefer to disagree with the learned counsel for the petitioner. The perusal of para 9 of the trial court order definitely shows that apart from deciding the maintainability of the application, the trial court has indeed taken into account the evidence led by the petitioner which consisted of applicant Prabhakar Vaidya as well as Advocate Mr.D.A.Athawale. Applicant's witness A.V.Bhise, who was also an advocate, was also examined and his evidence was also taken into account in order to come to the conclusion that there was no substance in the applicant's contention about informing him by the concern clerk about missing of the proceeding and he has not made any complaint to the court atleast requesting the court to direct the clerk to search out the case. Therefore, it was found by the trial court that the conduct of the applicant that despite availing number of chances for filing written statement and even

after rejecting his last application he did not care to file written statement itself shows that he had lost the interest in the said suit.

. The lower appellate court after discussing the maintainability of the application under Order 9 Rule 13 of the Code of Civil Procedure has indeed dealt upon the merits of the issue and has found that no sufficient ground was made out by the petitioner to seek restoration of the proceeding by setting aside ex-parte decree on merits.

8. On perusal of the orders passed by both the courts below, I am satisfied that both the courts have taken into account the merits of the dispute involved in the application and hence, the petition is devoid of any merits and as such deserves to be dismissed and stands dismissed with no order as to costs.

9. At this stage the learned counsel for the petitioner requested that some time should be given before execution of the decree. In view of the facts and circumstances, the execution of the decree shall stands Stayed for eight weeks on furnishing undertaking

within four weeks from the date of this order that he will not create third party interest in the suit property in the meantime and shall vacate the premises after the period of Stay is over.